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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

HENRY ALVARADO,

Defendant.

Case No.: CR 19–399 WHO

**DEFENDANT’S SENTENCING
MEMORANDUM**

I. INTRODUCTION

Henry Alvarado will be before the Court for sentencing in this case concerning a \$14 hand-to-hand in the Tenderloin. This case represents Mr. Alvarado’s first ever conviction and sentence, despite a very difficult life and an addiction to opiates and cocaine that began in his teenage years. As the Court will recall, Mr. Alvarado completed 90-day residential treatment at Pathways while under pretrial supervision approximately one year ago, but then unfortunately absconded in the Spring. Last year, Pathways reported to U.S. Probation that Mr. Alvarado underwent a “dramatic positive change in behavior and attitude,” and “took advantage of all the

1 supports offered and requested extra duties at the facility.” Presentence Report (PSR) ¶ 48. He
 2 wanted desperately to join the Court’s Alternatives to Incarceration Program (ATIP) and would
 3 have benefitted tremendously from the greatly increased level of support and supervision, but
 4 was ineligible to participate due to his status as an undocumented immigrant. Instead, after a
 5 relapse on the day prior to his presentence interview, which he admitted, he broke down under
 6 the stress of the impending sentencing hearing. Despite assurances from prior counsel (Ms.
 7 Linker) that the Court would likely understand his relapse, Mr. Alvarado was inconsolable, fell
 8 back deeply into his addiction, and ceased communicating with U.S. Pretrial Services.¹ Mr.
 9 Alvarado was arrested in November on suspicion of narcotics sales on the street in the
 10 Tenderloin, and has been charged in an open and ongoing case before the San Francisco Superior
 11 Court. Since his arrest on November 10, 2020, he has remained in continuous custody and, as of
 12 the sentencing hearing, will have accrued credit of approximately six months in federal custody.

13 Mr. Alvarado sincerely regrets his relapse and his resulting failure to appear for
 14 sentencing, as his letter to the Court reflects. Rizk Decl., Ex. A. Clearly, he still desperately
 15 needs help. In the event he is not deported following his release from his sentence, Mr. Alvarado
 16 is a potential candidate for Reentry Court given the traumas in his earlier life, his serious
 17 addiction disorder, and his mental health needs. Rehabilitation of Mr. Alvarado rather than
 18 incarceration, the defense respectfully submits, should be a leading objective for the Court in
 19 fashioning a sentence. Mr. Alvarado therefore asks for a sentence of time served (effectively, six
 20 months), following by three years of supervised release. He makes this request because, despite
 21 his relapse, failure to appear, and re-arrest, (1) this behavior was driven by his addiction, low-
 22 functioning, and personal circumstances, (2) this case is his very first conviction and sentence
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24
 25 ¹ Throughout this case, undersigned counsel and Ms. Linker observed some concerning signs of
 26 mild cognitive impairment in Mr. Alvarado’s thinking and communications to counsel—possibly
 27 a result of his severe substance abuse disorder or physical injuries he suffered during his
 28 childhood—including, most notably, after his relapse when he absconded. Rizk Decl. ¶ 3. The
 same was true immediately after he was arrested in November 2020. *Id.* Thankfully, his state of
 mind appears to have improved since then. To be clear, the defense does not doubt Mr.
 Alvarado’s competency by offering these observations.

ever, (3) he is likely to receive a separate sentence in his open San Francisco case, and (4) as set forth below, six months is a Guideline sentence, not a downward variance, and is greater punishment than otherwise similarly-situated defendants from the Tenderloin have received in this District. A sentence of six months for this addict and first-time offender, the defense submits, is a sufficient sentence.

II. FACTUAL BACKGROUND

Mr. Alvarado was born in 1990 to Henry Alvarado Escodo and Zoila Rodriguez Vazquez in Honduras. PSR ¶ 38. Although she lives across the country, Ms. Vazquez has a close relationship with Mr. Alvarado and remains supportive of him. *Id.* Mr. Alvarado no longer has any relationship with his father. *Id.* As set forth in the PSR, Mr. Alvarado and his sister suffered significant physical abuse at the hands of his father when they lived together in Honduras. *Id.* Mr. Alvarado suffered beatings during his childhood that were so severe that his friends and teachers noticed them at school. *Id.*



Mr. Alvarado with his mother and sister.

The family lived in an area of Honduras that was overrun by gangs. *Id.* ¶ 40. Mr. Alvarado and his family were threatened with violence if he did not join the gangs, and virtually all of his friends and acquaintances did so. *Id.* Mr. Alvarado and his mother came to the United States to escape in approximately 2005, when Mr. Alvarado was age 14. *Id.* Subsequently to coming to the United States, he learned of many deaths among those of his friends who stayed and submitted to the gangs. *Id.* Mr. Alvarado is understandably very fearful for his safety should he be deported to Honduras, but he also knows that he has an active ICE detainer and that if he is deported he must not return to the United States without permission, or else he will face a supervision violation and potentially new charges. *Id.*

When Mr. Alvarado arrived in the United States, he settled with a relative in Daly City, where they lived for approximately a year. His mother and sister remained in Honduras and his father, who was unsupportive of the move, cut off contact with Mr. Alvarado.

Id. ¶ 38. As a child Mr. Alvarado was full of joy. Rizk Decl. Ex. B. He attended Jefferson High School in Daly City. *Id.* ¶ 50. He reported to U.S. Probation that he struggled in school

due to the language barrier and lacked the

support to continue. *Id.* As a result, Mr. Alvarado dropped out after the 10th grade. He later moved to Richmond, and then Oakland. He worked doing odd jobs and construction. *Id.* ¶ 52. At the time this case was instituted, Mr. Alvarado was living in Oakland with his former girlfriend and her children. (Sadly, that relationship has fallen apart during the pendency of this case.)

Unfortunately, Mr. Alvarado developed a terrible addiction to cocaine while still in high school. *Id.* ¶ 47. It was an escape from the isolation and difficulties he experienced as a young man. Prior to this case, Mr. Alvarado had never previously received counseling or treatment for mental health, despite the abuse he suffered as a child. *Id.* ¶ 45. He has used cocaine daily since then, and also developed a daily addiction to heroin and other opiates. *Id.* ¶¶ 46-47. His addiction

led to a string of arrests, starting as a teenager and throughout his twenties. However, Mr.

Alvarado never sustained a conviction and sentence until this case. Throughout his life, he has been a heavy addict and he has only sold drugs to support



Mr. Alvarado growing up at home.



Mr. Alvarado (right) with friends eating out.

1 his own serious heroin habit. *Id.* ¶ 52. A few years ago, in connection with one of his arrests, Mr.
 2 Alvarado successfully completed diversion in a
 3 state drug case. *Id.* ¶ 29. He reported to U.S.
 4 Pretrial Services that he successfully participated in
 5 a court-referred drug program for approximately
 6 six months. Rizk Decl. ¶ 4. He also requested
 7 treatment during pretrial proceedings in this case,
 8 which led to the referral by Pretrial Services to
 9 Pathways. *Id.* As noted above, Mr. Alvarado
 10 embraced residential treatment and successfully
 11 completed a 90-day program on February 29, 2020.
 12 PSR ¶ 48. However, he relapsed approximately 10
 13 days later, and the stress of this case, combined
 14 with his distress over his relapse, was too much for
 15 him to bear. He fell farther into his addiction,
 16 despite the support and assurances defense counsel
 17 attempted to offer him, and then ceased communicating.



Mr. Alvarado shopping with a friend.

18 When he was arrested on November 10, 2020, he was living on the streets and again
 19 using cocaine and heroin. He was charged with sales of narcotics, and the case remains pending.
 20 Undersigned counsel has been in continuous contact with Mr. Alvarado's San Francisco public
 21 defender, who has related that the District Attorney's Office has not indicated it intends to drop
 22 the case. Rizk Decl. ¶ 5. Defense counsel has reviewed the arrest report and discovery in that
 23 case, and the prospect of a sentence in that matter, on top of the federal sentence, appears quite
 24 possible. *Id.* A bench warrant is currently in place in that case to ensure that Mr. Alvarado
 25 remains in custody and is returned to San Francisco following service of his sentence in this case.
 26 *Id.*

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III. SENTENCING GUIDELINES

Mr. Alvarado submits that the Guidelines should be calculated as set forth below:

Base offense level, U.S.S.G. § 2D1.1:	12
Acceptance of responsibility, U.S.S.G. § 3E1.1:	<u>-2</u>
Total Offense Level	10

Mr. Alvarado objects to the PSR's denial of credit for acceptance of responsibility. The Guidelines of course authorize the Court to consider his failure to appear for sentencing, as well as his conduct on pretrial supervision, including "post-offense rehabilitative efforts (*e.g.*, counseling or drug treatment)." U.S.S.G. § 3E1.1, App. Note 1(G). Fleeing to avoid a sentence would not support credit for acceptance of responsibility, concededly—but here the circumstances are quite different. First, of course, Mr. Alvarado did in fact plead guilty and accept a plea agreement early in proceedings. Second, he affirmatively sought and completed treatment as a form of rehabilitation and an indication of his desire to take responsibility for his criminal conduct and the addiction that drives it. Third, Mr. Alvarado did not flee. He relapsed, which he admitted to Pretrial Services. PSR ¶ 49. He remained in the community. Fourth, Mr. Alvarado has candidly conceded that he feared what the Court's reaction to his relapse would be at sentencing, but as counsel indicated above, his thinking at the time appeared changed due to his substance use. When he was arrested in November 2020, his affect and thinking appeared noticeably compromised due to the same. The bottom line is, Mr. Alvarado's addiction is sufficiently severe that he cannot take care of himself or reliably appear for proceedings when he is using substances, but that is not the same as refusing to acknowledge the wrongfulness of his conduct. Fifth, and finally, Mr. Alvarado's letter to the Court evinces sincere regret and speaks to his true state of mind more accurately than his addiction-driven behavior does. Rizk Decl. Ex. A.

Finally, and as a further indication of his acceptance of responsibility, Mr. Alvarado has offered to fully debrief the government concerning this offense prior to sentencing. Rizk Decl. ¶ 6. Mr. Alvarado is safety-valve eligible because (1) he has no prior criminal history, (2) the offense did not involve violence, threats, or a weapon, or (4) injury to anyone, and (5) Mr. Alvarado was not "an organizer, leader, manager, or supervisor of others in the offense."

U.S.S.G. §§ 2D1.1(b)(18), 5C1.2; *see also* 18 U.S.C. § 3553(f). Taking into consideration his satisfaction of the safety valve requirements, Mr. Alvarado's Total Offense Level (TOL) would be reduced an additional two levels.

Mr. Alvarado has no prior convictions that led to sentences and therefore falls into Criminal History Category I. The Guideline sentence associated with a TOL of 10 and CHC I is 6-12 months. If the Court accords Mr. Alvarado credit for acceptance of responsibility and satisfying the safety valve requirements, the Guidelines sentence associated with a TOL of 8 and CHC I is 0-6 months.

IV. LEGAL STANDARD

The Court is familiar with the directives of *United States v. Booker*, 543 U.S. 220 (2005) and 18 U.S.C. § 3553(a). The Sentencing Guidelines range is not mandatory and the Court has a duty to exercise judgment and discretion in arriving at an appropriate sentence. Importantly, the Court may not presume the Guidelines range is reasonable. *Nelson v. United States*, 555 U.S. 350, 352 (2009) (per curiam). Instead, the Court must consider the Guidelines range, the nature and circumstances of the offense, the history and characteristics of the defendant, and the need to avoid unwarranted sentence disparities among similarly situated defendants. 18 U.S.C. § 3553(a)(1), (a)(4) and (a)(6). In crafting a sentence that is "sufficient, but not greater than necessary," to comply with the purposes set forth in 18 U.S.C. § 3553(a), the Court must also consider the need for the sentence imposed: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational and vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. § 3553(a)(2).

V. ARGUMENT

Several matters warrant the Court's consideration in connection with Mr. Alvarado's request for a sentence of time served (effectively, six months) followed by three years of supervised release:

1 First, Mr. Alvarado's personal circumstances, his need for rehabilitation, and
 2 considerations of deterrence and public safety, cannot justify a longer sentence. Mr. Alvarado's
 3 life story is very sympathetic. He endured serious physical abuse as a child, was forced to flee his
 4 home at a young age due to threat and gang violence. Nearly all alone in this country, he failed to
 5 completely high school and fell into a serious long-term addiction. This offense consisted of
 6 street-level drug sales that did not involve violence, large quantities of controlled substances, or
 7 other particularly aggravating factors. Mr. Alvarado is certainly not a gang member, or an
 8 organizer or leader. He is an addict with relatively minimal criminal history who tried, and sadly
 9 failed, to establish his sobriety during this case. If he remains in this country, he will need
 10 considerable more assistance from the Court on supervised release.

11 As counsel has argued to the Court in other similar cases, the available data does not
 12 support the conclusion that longer sentences promote general deterrence.² Given the particular
 13 the circumstances of this case, the concept of specific deterrence also does not make sense in this
 14 particular case. As an initial matter, Mr. Alvarado has never received any prior sentence, so six
 15 months of custody has already sent a message to him. Moreover, Mr. Alvarado's conduct during
 16 this very case shows that his addiction does not operate in a rational manner. The reality is that
 17 his trauma and ongoing substance abuse are likely to have a greater impact on his behavior than
 18 the deterrent effect (if any) of a longer custodial sentence. The best way to address these risk
 19 factors is counseling and treatment, not greater institutionalization. Given all this context, the
 20 defense submits that the deterrent value of a marginally longer sentence, weighed against the
 21 desperation felt by undocumented addicts such as Mr. Alvarado, is questionable. The ordeal of
 22 his current and future incarceration during a global pandemic and near-certain deportation
 23 thereafter, followed by three years of supervised release, is sufficient punishment.

26 ² See, e.g., Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*
 27 FEDERAL PROBATION 80 (3), 33-38 (Dec. 2016) ("Severity of punishment was once thought to
 28 deliver the main deterrent effect; the more severe the consequence for law-breaking, the less
 likely an individual is to commit a crime. However, this assumption has not been supported in
 the literature.").

1 *Second*, the need to avoid unwarranted disparities counsels in favor of the recommended
 2 sentence. Without presuming to know what sentence the Court would have imposed had Mr.
 3 Alvarado appeared for sentencing last spring, the defense submits that Mr. Alvarado likely would
 4 have been at least considered for a sentence of time served (of roughly two months, at that time)
 5 had he not missed his sentencing date. At a minimum, that is what the data on outcomes for
 6 similarly-situated defendants from small drug cases out of the Tenderloin suggests. In preparing
 7 for sentencing, the Federal Public Defender's Office examined cases it defended that were part of
 8 the U.S. Attorney's Office's Federal Initiative for the Tenderloin (FIT) campaign. The defense
 9 found that even for comparable defendants in CHC I who were in a *higher* offense level (namely,
 10 TOL 12-14) and thus facing Guidelines of 10-16 months and up to 15-21 months, thirty-one out
 11 of thirty-nine of such defendants received time served sentences, of approximately 4 months on
 12 average. Rizk Decl. ¶ 7. Thus, even compared to defendants facing *higher* Guideline ranges, a
 13 sentence of six months would amount to greater punishment than what other defendants in
 14 otherwise similar circumstances received. This group includes, not unlike Mr. Alvarado, many
 15 defendants who suffered multiple arrests, some of which were not charged, as well as many
 16 defendants who possessed greater amounts of narcotics across multiple arrests than Mr. Alvarado
 17 did. Also important to keep in mind is that, unlike some of those other Tenderloin defendants in
 18 CHC I, Mr. Alvarado has not suffered a single prior conviction in his life. Nor has he ever served
 19 a sentence. Thus, six months is itself sufficient punishment to address Mr. Alvarado's failure to
 20 appear and re-arrest on new charges.

21 The defense appreciates that, notwithstanding the foregoing data points, the Court may
 22 have enduring concerns about Mr. Alvarado's arrest in November 2020, since it represents a
 23 significant breach of trust and violation of the conditions of his release. A couple observations
 24 are relevant: first, the San Francisco case remains open and a bench warrant is in place, so Mr.
 25 Alvarado will spend more time in custody after his federal sentence is served. Mr. Alvarado has
 26 not plead guilty, but defense counsel has reviewed the evidence and is concerned that Mr.
 27 Alvarado may receive a separate (and consecutive) sentence in that matter following the
 28 resolution of this case. It would therefore be a mistake for the Court to assume that the state case

1 will be dismissed, or that the federal sentence should include substantial additional time in
2 custody to punish Mr. Alvarado for the allegations made in that case. At this time, the District
3 Attorney's Office has not indicated that it plans to dismiss the state case and a warrant is instead
4 in place. Rizk Decl. ¶ 5.

5 Also related to the November 2020 arrest, the defense was able to locate one other nearly
6 identical case in which the defendant absconded, was re-arrested on new narcotics charges in the
7 Tenderloin. *See United States v. Christopher Alvarez Garcia*, No. 20-CR-309 CRB, ECF Nos.
8 36, 40. Mr. Garcia plead guilty pursuant to a plea agreement that included the exact same
9 Guidelines calculation at issue here (CHC I and TOL 10), and upon his release almost
10 immediately cut off his ankle monitor and absconded, and then was re-arrested on new narcotics
11 sales charges in the Tenderloin. *Id.* Mr. Garcia was arrested with multiple types of drugs
12 (including fentanyl, originally) in similar quantities to Mr. Alvarado, and at the time of
13 sentencing, was also facing an open state case in Superior Court, just like Mr. Alvarado. Mr.
14 Garcia was credited with acceptance of responsibility without objection from U.S. Probation or
15 the government, and the government asked for a custodial sentence of six months, which the
16 Court imposed. *Id.* That case is virtually on all fours with this case, except that the defendant in
17 that matter never completed residential treatment.

18 In sum, a longer period of incarceration will not achieve anything productive for the
19 Court or the community in this matter. Six months for an addict and first time convict, who has
20 suffered significant traumas and is likely facing more time for an open state case, and then
21 possible deportation, is certainly sufficient punishment to serve the purposes of the sentencing
22 statute.

23 *Third*, Mr. Alvarado's request comes at a time of extraordinary circumstances. He has
24 already served four of six months during harsh conditions at Santa Rita Jail during the COVID-
25 19 pandemic. Conditions in the jail are, as the Court is no doubt aware, much worse than usual.
26 Inmates are in tight quarters, even more so with the closure of North County Jail. Most units have
27 dozens of inmates living together, with two inmates to a cell. Access to personal hygiene items is
28 limited with only those inmates that have certain means able to purchase commissary. While the

jail has provided each inmate with a mask and one additional bar of soap, it is hardly enough to protect the population. Additionally, the jail has now restricted all visits to the jail. No attorney, family, friends, or even experts are allowed into the jail. Programming at the jail has been discontinued. Inmates are extremely anxious, and many are trying to stay holed up in their cells to avoid contact. Mr. Alvarado is himself very worried about himself and his mother and sister, with whom he has had limited contact since his arrest. Even after serving his federal sentence, Mr. Alvarado is likely to spend more time in state or immigration custody under equally harsh conditions. In sum, this is an exceptionally difficult time to serve a sentence. Time served now is much harder than time served under normal circumstances and conditions are not likely to change anytime soon. Thus, a six-month sentence imposed now should be considered a much harsher sanction than it would normally be. Again, even if the Court grants Mr. Alvarado's request for a time served sentence, he is likely to spend more time in custody in San Francisco or in custody during removal proceedings under very difficult conditions. For this final reason, additional custodial time is not necessary to mete out sufficient punishment, consistent with the mandate of § 3553(a).

VI. CONCLUSION

Mr. Alvarado respectfully asks for a sentence of six months, followed by three years of supervised release.

Dated: March 2, 2021

Respectfully submitted,

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/S

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